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IN THE

Supreme Court of the United States

October Term, 1970

No. 488

WILLIAM ALMSTEAD,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT.

IRVING ANOLIK
Attorney for Petitioner
225 Broadway
New York, N. Y. 10007
(212) 732-1322

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Statement

Petitioner, WILLIAM ALMSTEAD, respectfully prays that this Court issue a Writ of Certiorari to review the Judgment and order of the Supreme Court of the State of New York, Appellate Division, Second Department, which affirmed the judgment of the County Court, Westchester County, convicting the petitioner, William Almstead, on the crimes of robbery, first degree; assault, second degree; and grand larceny, first degree, after trial before DICKENSON, J., and a jury. The defendant was sentenced to a term of twelve and one half (12½) years to twenty years on the

robbery charge; 2½ to 5 years on the larceny charge but the direction was for concurrent sentences. A suspended sentence was pronounced with respect to the assault.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1253.

The Court of Appeals of the State of New York denied leave to appeal on June 1st, 1970.

Questions Presented

1. Whether petitioner's constitutional rights were violated as a result of the pre-trial identification procedures employed in this case, namely, that the police brought the only alleged eye-witness to Manhattan from Westchester County to view the defendant alone, without a line-up?

2. Whether the defendant's constitutional rights under the Sixth Amendment were violated by failure to provide counsel and adequate warnings to him at the time of the alleged pre-trial identification by the victim, Massella?

3. Whether petitioner's constitutional rights were violated by failing to provide him an adjournment in order fo obtain witnesses in his behalf?

Constitutional and Statutory Provisions involved:

The Fifth, Sixth and Fourteenth Amendments, of the United States Constitution are herein involved.

Statement of the Case

The offices of the Westchester Street Transportation Company, a bus company, located at 450 E. Sanford Boulevard in Mt. Vernon, N. Y. was the scene of a robbery on September 21, 1966.

One Patsy Massella, the company's chief starter, or dispatcher, was seized from behind at about 8:10 a.m. at the office of the company and was hit on the side of the head by what he believed to be a gun.

He was unable to see his attacker and was told to open the safe (73-77)*.

Previously, that morning, Massella had prepared a bank deposit slip representing a total of $9,471.12 in bills and coin which was packaged in 16 canvas bags (58, 72).

He was ordered to open the safe but said he did not know the combination. For about 5 seconds he stood face to face with the robber and then knelt down and began to open the safe. (77-80).

The safe was finally opened and upon the thief's instructions, Massella, got up and was pushed back into the hall. He heard the thief call to someone else and a second person gaged Massella with a towel and tied his wrists and ankles together behind him with a length of double strand wire (83-86).

The twosome then took the 16 bags full of money and left (86-88) (108, 109).

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* Numerals in parenthesis refer to pages of the official court reporter's minutes of trial unless otherwise indicated.

The Petitioner presented an alibi defense that at the time of the alleged holdup he was at 146 Elm Street, and, therefore, could not have been at the scene of the robbery. (133, 153, 169).

At the trial, the defense (petitioner) sought to dismiss the indictment but coupled with that motion was an apparent effort to obtain an adjournment so that additional alibi witnesses, namely, the petitioner's two brothers, could testify in his behalf.

In a bill of particulars, the petitioner had set forth the names of both missing witnesses, that is his brothers, as "alibi" witnesses.

Unfortunately, these two important witnesses were not available at the time of trial but no adjournment was granted.

The two missing witnesses, of course, are now available.

POINT I

The Defendant-Petitioner's Constitutional Rights under the Sixth and Fourteenth Amendments of the United States Constitution were violated by the improper pre-trial identification procedures used in connection with this prosecution. Patsy Massella, the only prosecution witness, who could incriminate petitioner, was an elderly man who admitted that the police were highly suggestive in the pre-trial identification proceedings.

The victim of the alleged holdup, Patsy Massella, stated that he was 63 years old and further admitted that his identification of the petitioner was the result of having been led

by the police to a location for the purpose of making an identification of the petitioner alone.

In the pre-trial felony hearing, Massella declared that he had been shown *photographs* of the defendant and never saw the defendant in a "line-up". (F. H. 23-25).* (*Simmons v. United States*, 390 U.S. 377).

The following questions and answers at the felony hearing occurred (F. H. 25):

> "Q. You never identified Mr. Almstead in a line-up of people at Headquarters? A. No.
>
> Q. Right? A. Right.
>
> Q. And your alleged identification was the result of having been led to that place directly by the police, precisely for the reason, to make an identification? A. Right."

The witness, Patsy Massella, was unable to recognize a scar on the defendant's face from only two feet away. (F. H. 16)

Moreover, the witness was unable to recall whether or not the perpetrator of the crime had been wearing a hat. He could not give any information about the color of his hair or whether he was wearing a shirt or a raincoat.

In essence, his reliability as a person who could identify the defendant was almost ludicrous.

It is quite apparent that the defendant did not have counsel at the time the identification was made. Moreover, the rights to confrontation of witnesses was not explained to the defendant at that time either.

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* Numerals in parenthesis preceded by the letters F. H. refer to minutes of the felony hearing, otherwise they refer to the Trial Transcript.

In addition, the police brought this witness, the *only* witness, to a place to identify the defendant telling him in advance that he was going to see a "suspect" in the investigation of the robbery.

It is undisputed that petitioner had no counsel and was not told of his rights.

With this highly suggestive one-man viewing, it is difficult to believe that the witness would have come to any other conclusion that to identify the petitioner as the robber.

In the *United States* v. *Wade*, 388 U.S. 218, and *Gilbert* v. *California*, 388 U.S. 263, the Supreme Court of the United States lays down certain guide posts for identification procedures. Those cases condemned unnecessarily suggestive pre-trial identification procedures.

In *Stovall* v. *Denno*, 388 U.S. 293, 301, 302, the Supreme Court of the United States declared that even in earlier cases, the "inquiry is whether 'the confrontation . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that (defendant) was denied due process of law' ".

Some of the items that are important are whether or not there was a line-up and whether or not the witness for the prosecution who made the identification saw the suspect in a line-up and in addition what the circumstances may have been.

It is undisputed that no line-up procedure was conducted. As a matter of fact, the police brought the victim to another public building where they told him that he was going to view the suspect. The petitioner, of course, had no opportunity to consult counsel and was not even advised of his

constitutional rights in that regard. At least two days elapsed before the victim was brought to identify the defendant-petitioner. The victim had been shown photos of petitioner. (*Simmons* v. *United States, supra*).

Since the petitioner was in custody at the time of the identification was made, i.e., he had been seized in a public building by the police, there was no reason to have eliminated a line-up. Arrangements could easily have been made to do so.

In short, it is quite evident that the defendant was denied his constitutional rights in the identification procedures.

POINT II

The state trial court erred in refusing to grant an adjournment to the Defendant-Petitioner for the purpose of securing two alibi witnesses who could have corroborated the fact that he could not have committed the crime if they had been called.

It is elementary that a fair trial includes the right to compel the attendance of witnesses in one's behalf (6th Amendment, United States Constitution). As a matter of fact, the cases of *Smith* v. *Illinois*, 390 U.S. 129, 131, 132 and *Alford* v. *United States*, 282 U.S. 267, stand for the proposition that witnesses are essential to protect the rights of the defendant in a criminal trial. While those cases are not necessarily directly involved with the issue here present, nonetheless, the general principal is well explained in those particular decisions.

In *Mesarosh* v. *United States*, 352 U.S. 1, the Supreme Court condemned any procedure which is fundamentally unfair to a defendant. The adjournment requested should have

been granted because the crime charged was very serious and if alibi witnesses, who incidentally were disclosed in a bill of particulars by the defendant in advance of trial, could have proved his innocence, they should have been permitted to testify.

In the final analysis the fundamental rights of this petitioner were violated because he was not permitted to compel the attendance of witnesses whose names he had disclosed in advance of trial and whom he identified as essential alibi witnesses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

Certificate Denying Leave

STATE OF NEW YORK

COURT OF APPEALS

Before:

HON. ADRIAN P. BURKE,

Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

WILLIAM ALMSTEAD,

Defendant-Appellant.

I, ADRIAN P. BURKE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to § 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
June 1, 1970

ADRIAN P. BURKE,
Associate Judge

Order

NEW YORK SUPREME COURT

APPELLATE DIVISION—SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

WILLIAM KENNY ALMSTEAD,

Defendant-Appellant.

Before CHRIST, P.J.: RABIN; HOPKINS; BRENNAN, JJ. (Beldock, P.J. deceased).

"Judgment of the County Court, Westchester County, rendered December 6, 1968, affirmed. No Opinion."

(The foregoing order was published in the New York Law Journal on the 22nd of April, 1970)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

E. ROBERT SEAVER, CLERK

No. . . . . .

WILLIAM ALMSTEAD,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

CARL A. VERGARI,
District Attorney of
Westchester County,
Court House,
White Plains, New York 10601.
914 761-1144

By: JAMES J. DUGGAN,
Administrative Assistant District Attorney,
Of Counsel.

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CASES CITED

Gilbert v. California, 388 U. S. 263, 18 L. ed. 2d 1178, 87 S. Ct. 1951 4

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

WILLIAM ALMSTEAD, Petitioner,

against

THE STATE OF NEW YORK, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Pursuant to the Revised Rules of this Court, Rule 24, the respondent submits this brief in opposition to the captioned petition for a writ of certiorari.

Questions Presented

The following questions are presented by this appeal:

1. Was the identification procedure "so unnecessarily suggestive and conducive to irreparable mistaken identification that (the petitioner) was denied due process of law." *Stovall* v. *Denno*, 388 U. S. 293, 302?

2. Was the petitioner's motion to dismiss the indictment by reason of the State's alleged failure speedily to prosecute it properly denied?

Facts

The offices of the Westchester Street Transportation Company, a bus company, were located in 1966 at 450 East Sanford Boulevard in Mount Vernon (25).* The petitioner's father, William Almstead, Sr., had worked for the company as a driver for eight years, but had resigned his position in 1965. Fairly frequently during that time the petitioner had come to the office to leave things for his father or to pick up things (59-60).

Early in the morning of September 21, 1966, Patsy Massella, the Company's Chief Starter or Dispatcher came in to work. At that time he was alone, and both the office door and the safe were closed and intact (69-72). He went about his routine work checking cash receipts and making up a bank deposit slip in preparation for a pickup later on in the day by a Wells-Fargo armored car of the previous two days' cash (71). That represented a total of $9,471.12 in bills and coin, and it was packaged in sixteen canvas bank bags (58, 72). He then relocked the safe and went down to the garage, locking the office door as he left, where from 6:00 A. M. to 7:30 A. M. he got the variously scheduled buses on the road (73-74). He returned to the office and again found the office door and the safe secure. From then until 8:10 A. M. he was alone in the office working on transfers, answering the telephone and generally getting ready for the day's work ahead (74-76).

At 8:10 A. M. Massella left the office and carried some transfers out into the hall. He was seized from behind in such a way as to prevent him from turning, and he was hit on the side of the head by what he believed was a gun. He was shoved back into the office, still unable to see his attacker, and told to open the safe (76-77). When he replied that he couldn't open the safe because he didn't know

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*Numbers in parentheses refer to minutes of the trial record.

the combination his assailant spun him around and hit him again with the gun, this time in the left temple. For about five seconds at that point he and the robber stood face to face, and finally Massella turned, knelt down and began to open the safe (77-80). The first time he tried the combination it didn't work, and the bandit put the gun against his neck and growled "Stop stalling; this is it; either you open it this time or you're dead" (80-81). He then opened the safe. At the thief's instruction Massella got up and was pushed back out into the hall where the two remained for thirty to forty-five seconds. He then brought Massella back into the office and made him lie face down on the floor. As he lay there he heard the man call to someone else to come in, and at that point Massella heard a new pair of footsteps enter the office (81-82). The second person gagged Massella with a towel and then tied his wrists and ankles together behind him with a length of double strand wire (83-86). Then in three trips apiece the two men carried the sixteen money bags out of the office. When he was satisfied they had left for good Massella was able to roll over and note the time as being 8:18 A. M. on the office clock (86-87). He remained there, helpless, until 8:45 A. M. when he was found by a driver who was coming in from a run (113) and a supervisor who was coming in to work for the day (108-109). Massella identified the petitioner as the first man into the office, the individual who made him open the safe (79).

The petitioner presented a defense which essentially was one of alibi. He introduced an agent of a private investigative agency who stated that he had driven from 450 East Sanford Boulevard in Mount Vernon to 146 Elm Street in Yonkers. He started at 8:18 A. M. and driving at normal speed arrived at the Yonkers address at 8:42 A. M. (187-189), an elapsed time of twenty-four minutes. The petitioner then produced four witnesses, three of whom testified that they had seen him at 146 Elm Street at 8:25 A. M. while the fourth testified she had sent her children

to school at 8:15 A. M. thus locating the time ten minutes after that when one of the first three witnesses had seen the petitioner at 8:25 A. M. (134, 154, 171, 205). The net result of the testimony, therefore, was to place the petitioner at the Elm Street address seventeen minutes before he could have gotten there if he left the bus company, as Massella said he did, at 8:18 A. M.

On rebuttal the People introduced the two investigating detectives who testified that when they interviewed the alibi witnesses the day after the robbery the first three told them that the petitioner had arrived at the Elm Street apartment between 8:45 and 8:50 A.M. and that the woman whose children had contributed to the chronology of his arrival had told them they had gone to school that day at 8:30 A.M. because it was raining and she didn't want them standing out in the rain until the school opened (220-223, 237, 242). In addition Sergeant Colbert testified that he too had driven from the bus company in Mount Vernon to 146 Elm Street in Yonkers and that driving at a normal rate of speed the trip had taken him only fifteen minutes (223-225). That would, of course, have allowed the petitioner to leave Mount Vernon at 8:18 A.M. and still be at Elm Street as early as 8:33 A.M.

POINT I

None of the petitioner's rights was violated by the manner in which the identification procedure was conducted.

Because this identification took place prior to the holdings of this Court in *United States* v. *Wade*, 388 U. S. 218, 18 L. ed. 2d 1149, 87 S. Ct. 1926, and *Gilbert* v. *California*, 388 U. S. 263, 18 L. ed. 2d 1178, 87 S. Ct. 1951, they have no application to the present case, *Stovall* v. *Denno*, 388 U. S. 293, 18 L. ed. 2d 1199, 87 S. Ct. 1967. We must therefore go to *Stovall* in order to determine to what extent, if

any, this identification should be reviewed. There the standard was said to be a determination of whether the confrontation was "so unnecessarily suggestive and conducive to irreparable mistaken identification that (the defendant) was denied due process of law," *Stovall* v. *Denno*, *supra*, 388 U.S. at 302.

The petitioner's brief, rather than informing the Court of the full circumstances surrounding the manner in which Massella identified him, is content to say that the police took Massella to "a location for the purpose of making an identification alone" (Petition, p. 5). That is very like describing Rip Van Winkle as a heavy sleeper. Both assertions may be true, but the critical information is artfully concealed behind the understatement. The "location" to which Massella was taken was a Criminal Part of the New York Supreme Court in New York City where the frenetic pace of the activity is probably better imagined than described. The "alone"-ness the petitioner suggests simply means that he stood "alone" before the bench to be arraigned, one face in a never ending parade of faces.

The hallmark distinction between the lineup procedure, where a group of people are displayed to a witness, and the so-called showup procedure, where the witness views one person, is the concept of *selection*. In the latter situation there is no selection because the witness is called upon to say only either yes or no, this is or is not the man who robbed me. The former is therefore considered more reliable because the odds against an erroneous identification are so much higher. Qualitatively, though, the same high odds attend the viewing of the same group of individuals whether they be lined up five or ten abreast or marched past the witness one at a time, because the same degree of selection must be practiced in either case. It is this latter type of "lineup," then, that was held in this case. Massella was called upon to pick the robber out of a group of men who, in a sense, were paraded by him one at a time

for his inspection. It is submitted there is nothing unfair in such a procedure, and certainly no one will seriously argue that it is so unnecessarily suggestive or conducive to irreparable mistaken identification as to put it within the proscription of the *Storall* rule.

POINT II

There was no request for an adjournment by the petitioner.

The petitioner is arguing under this point that the Court erred in having denied him an adjournment so that he could secure the testimony of two alibi witnesses who were not then available. The respondent most seriously urges upon the Court the view that he never asked for an adjournment. There *was* a motion made to dismiss the indictment pursuant to the New York Code of Criminal Procedure, Sections 8; 688, on the ground that it had not been speedily prosecuted. In the Appellate Division of the New York Supreme Court and again in this petition we find that this motion to dismiss has conveniently become a motion for an adjournment. For the sake of clarity, a copy of the notice of motion and the affidavit in support thereof are reproduced herewith as Exhibit "A".

In order to make this transformation from a motion to dismiss to a motion to adjourn even superficially credible, the petitioner argued in the Appellate Division that:

> "Judge Dickenson treated these papers as a two-pronged motion, both as the motion to dismiss for unreasonable delay in prosecution and as a motion for adjournment on the grounds of the unavailability of alibi witnesses." (Appellant's Brief, p. 5)

This simply cannot be done; the two are mutually exclusive. By definition, in order to avail himself of the benefit of a motion to dismiss by reason of a failure to prosecute

a defendant must be in a position to certify to the Court that no delay has been or can be attributed to him. He must therefore assure the court that he is now and has always been ready and willing to go to trial. This underlying prerequisite is belied altogether if the motion to dismiss is coupled with or treated as a request for an adjournment. In other words, then, in order for a defendant to be qualified to make a motion to dismiss he must first repudiate any suggestion of further adjournment. He may not suffer the prosecutor to secure one, *People* v. *Prosser*, 309 N. Y. 353, and certainly he may not request one.

Granting, therefore, that these two concepts, dismissal and adjournment, cannot exist together, one must be discarded in this situation, and, because the motion was clearly one for dismissal and included citations to the appropriate sections of the Code of Criminal Procedure, it is submitted that any thought that this was either exclusively or partially a motion for an adjournment must be completely rejected.

POINT III

The petition should be denied.

Respectfully submitted,

CARL A. VERGARI,
District Attorney of
Westchester County.

By: JAMES J. DUGGAN,
Administrative Assistant District Attorney,
Of Counsel.

September 10, 1970.

Exhibit A.

COUNTY COURT,

WESTCHESTER COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK,

against

WILLIAM ALMSTEAD,

Defendant.

722-66

PLEASE TAKE NOTICE that the undersigned will move this Court on Tuesday, October 8th 1968, at 10:15 A.M. of said day, or as soon thereafter as counsel can be heard for an order dismissing indictment No. 722-66 against the above entitled defendant on the grounds that said defendant was deprived of his right to a speedy trial pursuant to Sections 8 and 668 of the Code of Criminal Procedure, and pursuant to the relevant sections of the Constitution of the United States of America and the State of New York.

Dated: October 8th, 1968.

Yours, etc.,

JOSEPH S. RAGNO
Attorney for Defendant
Office & P. O. Address
20 East First Street
Mount Vernon, New York

To:

HON. CARL VERGARI
District Attorney
Westchester County

Exhibit A-2.

COUNTY COURT.

WESTCHESTER COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK,

against

WILLIAM ALMSTEAD,

Defendant.

722-66

STATE OF NEW YORK
COUNTY OF WESTCHESTER
CITY OF MOUNT VERNON } ss.:

JOSEPH S. RAGNO, being duly sworn, deposes and says:

1. I am the attorney for William Alstead who was indicted in the Fall of 1966 (No. 722-66) for the crime of Robbery first degree, Assault second degree, Grand Larceny first degree.

2. I appeared for said defendant on his arraignment, interposed a plea of not guilty, and demanded a trial by jury.

3. On or about December 7th 1966, I was served a demand for a bill of particulars pursuant to Section 295-1 of the C.C.P. relating to my client's alibi. On or about December 27th 1966, I served my bill of particulars naming, inter-alia, Robert Almstead and Gene Almstead as persons who could establish defendant's presence elsewhere than at the scene of the crime at the time of its commission.

4. The first notice I had of the trial of this indictment came to me via telephone from Assistant District Attorney Donohue about the middle of September, 1968.

5. I located my client at the Kingsbridge V.A. Hospital from whence he was released in the latter part of September, 1968. I notified Mr. Donohue of these facts, who informed me that the trial of the case was scheduled for October 1st 1968, which trial day was set for October 7th 1968.

6. I saw my client about two weeks ago to review the case with him and learned that neither Robert Almstead nor Gene Almstead were in this jurisdiction, one being in the service in Viet Nam, and the other now residing in California with his father.

7. If the trial had been earlier scheduled these two witnesses would have been here to testify. The danger of the delay in the trial of an indictment is the dimming of witnesses' memories and the unavailability of witnesses, the latter case working irreparable injury to my client herein.

8. A few days ago I notified Mr. Donohue of the unavailability of these witnesses and to the possibility of stipulating that if they testified they would testify that one saw the defendant asleep at home at 7:45 A.M. on September 21st, 1966, and the other saw him asleep at 7:55 A.M. on said day.

9. This professed stipulation was rejected with the consequent damage to my client's defense, all of which would not have occurred if the case had come on for trial within a reasonable time.

10. Upon information and belief many cased junior to the instant case have been tried or schedules for trial.

11. Nothing has transpired to relegate this 1966 case to a late 1968 trial date.

12. The defendant has sought no adjournments or stays in this matter nor has he made motions which have necessitated his inordinate delay.

WHEREFORE your deponent prays that the indictment against the defendant herein be dismissed pursuant to Sections 8 and 668 of the C.C.P. and pursuant to State and Federal Constitutional guarantees to a speedy trial.

/s/ JOSEPH S. RAGNO
Joseph S. Ragno

Sworn to before me this
8th day of October, 1968.